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**IN THE
COURT OF APPEALS OF INDIANA**

KEITH ALLEN BALL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 84A05-0609-PC-535

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0206-FB-1619

May 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Keith Allen Ball appeals from the trial court's order revoking his probation and requiring him to serve the remaining six years of his original ten-year sentence. On appeal, Ball raises two issues, which we restate as whether sufficient evidence supports the trial court's finding that Ball violated a term of his probation, and whether the trial court's order revoking Ball's probation and requiring him to serve the entirety of his suspended sentence was an abuse of discretion. Concluding that sufficient evidence supports a finding that Ball violated a term of his probation and that the trial court acted within its discretion in ordering Ball to serve the remainder of his sentence, we affirm.

Facts and Procedural History

On June 7, 2002, the State charged Ball with child molesting, a Class B felony. On February 25, 2003, Ball pled guilty pursuant to a plea agreement. The trial court accepted the plea agreement and sentenced Ball to ten years, with six years suspended to probation. One of the terms of Ball's probation was that he was to "have no unsupervised contact with children under the age of 16." Appellant's Appendix at 5.

Ball was released from prison and placed on formal probation on April 4, 2006. On May 28, 2006, Ball was camping in Vigo County on a campsite rented by his friend Robert Stewart. Along with Ball and Stewart were Stewart's wife, Nicole, and cousin, Josh. Stewart was 26 and Nicole was 24 at the time. Sometime during the day, Ball encountered a group of youths, aged 14 to 16, at a park beach. Apparently, these youths had been searching for a place to spend the night, and Ball invited them to spend the night at Stewart's campsite.

At 3:12 a.m. on May 29, Deputy Scott Brown, of the Vigo County Sheriff's Office, was dispatched to the campsite based on a park guard's report that several youths had been seen stealing bicycles. When Deputy Brown arrived at the campsite, he observed three youths sleeping outside Ball's tent. After Deputy Brown woke the youths, Ball and a fifteen-year-old youth, R.B., emerged from the tent. R.B. indicated that he had slept in Ball's tent, alone with Ball, for approximately three hours.

On May 31, 2006, the State filed a Notice of Probation Violation, alleging that Ball had had unsupervised contact with a child under the age of sixteen. The trial court held a probation revocation hearing on July 27, 2006. At this hearing, Ball admitted that he had been alone in the tent with R.B., but argued that because Stewart and Nicole were also on the campsite, adults had supervised his contact with R.B. The trial court found that Ball had violated the terms of his probation because "having someone in a motor home while the Defendant and a juvenile under sixteen are alone in a tent is not supervision." Transcript at 36-37. The trial court noted that while incarcerated, Ball had violated numerous prison rules, and that this probation violation had occurred fewer than 45 days after his release. Therefore, the trial court stated that "probation isn't gonna be the answer or any kind of alternative sentencing," and ordered Ball to serve the six years that had previously been suspended. Id. at 38. Ball now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Probation hearings are civil proceedings, and the State must prove that a violation occurred by a preponderance of the evidence. Kelnhofer v. State, 857 N.E.2d 1022, 1023 (Ind. Ct. App. 2006); Ind. Code § 35-38-2-3(g). When determining whether sufficient evidence supports the trial court’s decision, we will consider the evidence favorable to the judgment, and will not reweigh the evidence or judge witnesses’ credibility. Kelnhofer, 857 N.E.2d at 1023. If substantial evidence of probative value exists to support a finding that a violation occurred, we will affirm the trial court’s decision. Id.

B. Sufficient Evidence Supports the Trial Court’s Decision

Ball argues that “[t]here is clearly insufficient evidence to establish that [he] violated the terms of his probation simply because he was just in a tent with an individual 15 years of age . . . because the evidence is clear that there was adult supervision present at the campsite.” Appellant’s Brief at 6. We disagree.

Initially, being alone in a tent with a minor, regardless of whether the other people on the campsite are aware of the situation, constitutes unsupervised contact. The clear purpose of ordering Ball, a convicted child molester, to have no unsupervised contact with children is to guard against situations where further inappropriate conduct could occur. It requires no elaboration to explain how sleeping alone in a tent with a child constitutes such a situation. Also, Brenda French, a park employee, testified that Stewart and Nicole did not know that the youths were on the campsite. Tr. at 15. Deputy Brown also testified that it was his “belief that the folks in the tent were not being supervised by any other adult.” Id. at 22. The circumstances, as admitted to by Ball, and the testimony of French and Deputy Brown

constitute sufficient evidence to support a finding that Ball had unsupervised contact with a child, thereby violating a term of his probation.

II. Revocation of Probation

A. Standard of Review

“Probation is a conditional liberty that is a privilege, not a right.” Hubbard v. State, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). Upon finding that one has violated a term of his or her probation, the trial court may revoke that person’s probation. Ind. Code § 35-38-2-3(a). A single violation is a sufficient basis for the trial court to revoke a defendant’s probation. Hubbard, 683 N.E.2d at 622. When a violation occurs, the trial court has three options: “(1) continue the person on probation, with or without modifying or enlarging the conditions; (2) extend the person’s probationary period for not more than one (1) year beyond the original probationary period; or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.” Ind. Code 35-38-2-3(g). We will review a trial court’s decision regarding the execution of a suspended sentence for an abuse of discretion.¹ See Sanders, 825 N.E.2d at 956.

¹ In his appellate brief, Ball cites Indiana Appellate Rule 7(B), and argues that we have the authority to revise his sentence if we conclude it is inappropriate in light of the nature of his offense and his character. A defendant may not collaterally attack a sentence when appealing from a probation revocation. Stephens v. State, 818 N.E.2d 936, 939 (Ind. 2004). Ball’s argument that we consider whether his sentence is inappropriate is analogous to a collateral attack on the original sentence, and we will review the trial court’s decision only for an abuse of discretion. See Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied (noting that although our supreme court used language in Stephens suggesting that it may have reviewed the trial court’s decision under Rule 7(B), “we believe – given our existing caselaw regarding appellate review of a trial court’s probation decisions and regarding the prohibition against collaterally attacking an original sentence following revocation of probation – that the standard of review used when reviewing whether a defendant’s probation revocation is unreasonable is an abuse of discretion”); Johnson v. State, 692 N.E.2d 485, 488 (Ind. Ct. App. 1998).

B. Trial Court's Order

Ball argues that “the imposition of 6 years executed is grossly excessive” because “[t]here is no evidence of wrongful touching or any type of sexual deeds or acts.” Appellant’s Br. at 7. Had Ball engaged in any inappropriate touching or sexual activity with R.B., his conduct would have constituted not only a violation of his probation, but also a separate offense, punishable by prison time in addition to his suspended sentence. See Ind. Code § 35-42-4-9 (sexual misconduct with a minor). The fact that Ball did not break a law does not inherently make it unreasonable for the trial court to have revoked Ball’s probation and ordered him to serve the remainder of his sentence.

As we have previously stated, “so long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of a violation by a preponderance of the evidence.” Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999).

As discussed above, sufficient evidence was introduced indicating that Ball violated his terms of probation. Therefore, the trial court acted within its discretion in ordering that Ball serve the suspended portion of his sentence. See Crump v. State, 740 N.E.2d 564, 573 (Ind. Ct. App. 2000), trans. denied; Kincaid v. State, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000).

We also note that the trial court provided two compelling reasons for ordering Ball to serve the remainder of his suspended sentence. First, Ball committed this violation less than two months after his release. Second, while Ball was incarcerated, he amassed somewhere between 15 and 25 rule violations, and while imprisoned prior to his probation revocation

hearing, Ball received several write-ups and was placed in solitary confinement. We also note that although no evidence indicates that any inappropriate conduct occurred, this violation is directly related to the underlying offense. Ball's lack of regard for the rules of his probation supports the trial court's conclusion that forms of punishment other than incarceration would not be appropriate. The trial court acted within its discretion in ordering Ball to serve the previously suspended portion of his sentence.

Conclusion

We conclude that sufficient evidence supports the trial court's finding that Ball violated a term of his probation. We further conclude that the trial court's decision to revoke Ball's probation and order that he serve the remainder of his suspended sentence was not an abuse of discretion.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.